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No. 14-1375

IN THE

Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* in support of Petitioner and of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this matter regarding the propriety of awarding attorney's fees to a prevailing defendant where the EEOC's failure to investigate or attempt conciliation results in dismissal of a subsequent Title VII lawsuit. The court below ruled, erroneously, that an award of attorney's fees and costs is unavailable in the absence of a judicial determination on the merits of the underlying claim, and that dismissal for failure to investigate or conciliate does not constitute a merits decision.

As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and NFIB collectively have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important Title VII questions. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

On September 27, 2007, Respondent U.S. Equal Employment Opportunity Commission (EEOC) commenced a civil action against Petitioner CRST Van Expedited, Inc. (CRST), accusing it of engaging in unlawful sex discrimination against a class of mostly unidentified women, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Pet. App. 34a. The suit was based on a single charge of discrimination filed in December 2005 by charging party Monika Starke alleging that she had been sexually harassed by two male drivers who were assigned to train her. Pet. App. 165a.

Although the EEOC's investigation initially focused on Starke, it subsequently was expanded to include other female drivers who either had worked with the same male drivers or who had filed internal discrimination complaints. Pet. App. 171a-180a. To that end, the EEOC requested (and CRST provided) contact information for all female drivers and student drivers employed by the company during a two-year period. Pet. App. 177a, 179a-180a.

Approximately two months later, the EEOC issued a Letter of Determination notifying CRST that the agency had reasonable cause to believe the company had subjected Starke and "a class of employees and prospective employees" to sexual harassment, although it did not identify the individuals composing, or the size of, the alleged class. Pet. App. 180a. The letter invited CRST to participate in the conciliation process, to which CRST responded by requesting a meeting and expressing its desire to reach a voluntary resolution. *Id.*

The EEOC refused to meet with CRST until it submitted a conciliation "proposal." Pet. App. 181a. When pressed by CRST to present its own conciliation demand, the EEOC responded by phone that it would seek the appointment of a monitor to "examine the employer's workplace to discover and eliminate sexual harassment, and relief for the class." Pet. App. 182a. When CRST asked for more information about the class, the EEOC responded that it "was not able to provide the names of all class members . . . or an indication of the size of the class," *id.*, but that it would "require as part of conciliation that CRST send a letter to past and present employees to help identify class members so settlements could be paid to them." *Id.* Shortly thereafter, CRST notified the EEOC that given the agency's failure to provide critical information regarding the class, it did not see a meaningful path to successful conciliation. That, in turn, prompted the EEOC to declare conciliation a failure. Pet. App. 182a-183a.

The EEOC subsequently filed suit alleging that Starke and "a class of similarly situated female employees" were subjected to a sexually hostile work environment and that CRST had failed to prevent and correct the harassment. Pet. App. 183a (citation omitted). Again, the EEOC declined to identify the size or composition of the alleged victim class. Pet. App. 186a-187a. Although the class initially appeared to be "relatively small," Pet. App. 187a, it later became clear to the district court that the EEOC "did not know how many allegedly aggrieved persons on whose behalf it was seeking relief [and that it] was using discovery to find them." Pet. App. 188a. During discovery, the agency mailed close to 3,000 letters to former female CRST employees inviting them to participate in the suit. *Id.* With CRST in the

unenviable position of facing a "continuously moving target of allegedly aggrieved persons," the court set a firm deadline for the EEOC to identify its class. Pet. App. 188a-189a.

When the deadline arrived, the EEOC had identified approximately 270 women, a figure that increased dramatically as the deadline approached. Pet. App. 189a. Even after the deadline had passed, the EEOC advised CRST that its "[i]nvestigation is continuing," Pet. App. 190a (citation omitted), and that it planned to amend its list as its "investigation and discovery ... is conducted." Pet. App. 190a n.16 (citation omitted). In the end, the EEOC made only 150 women available for deposition, and the court limited any recovery to those individuals. Pet. App. 192a. The court eventually ruled, through a series of dispositive motions, that the EEOC was barred from seeking relief for the majority of the women, including Starke. Pet. App. 192a-193a.

As to the remaining 67 individuals, the trial court ordered the EEOC to identify, with respect to each aggrieved person, the date on which a charge was filed and investigated, as well as the dates of the EEOC's Letter of Determination and on which conciliation was attempted. The EEOC disclosed to the court that while a handful of the women did file EEOC charges at various points, one did not allege sexual harassment at all. It also admitted that it did not independently investigate any of the 67 individuals' sexual harassment allegations, did not issue reasonable cause findings, and did not attempt conciliation as to those claims. The agency further conceded that to the extent it looked into the individual allegations at all, it was only in the context of investigating the Starke charge. Pet. App. 204a-206a.

CRST subsequently filed a Motion for Order to Show Cause why the EEOC's claim on behalf of the remaining 67 women should not be dismissed on the ground that the agency had failed to fulfill its pre-suit administrative obligations. Pet. App. 193a. The trial court granted the motion, ruling that the EEOC had "wholly abandoned" its statutory duty to investigate and conciliate the claims of all 67 women prior to instituting its lawsuit. Pet. App. 204a.

Thereafter, CRST moved for an award of attorney's fees, arguing that the EEOC's actions in bringing the case were frivolous, unreasonable, and without foundation. Pet. App. 11a. Applying the standard for awarding attorney's fees to prevailing defendants in Title VII cases established by this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the district court determined that such an award was warranted because "[t]he EEOC's failure to investigate and attempt to conciliate the individual claims constituted an unreasonable failure to satisfy Title VII's prerequisites to suit." *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2010 WL 520564, at *7 (N.D. Iowa Feb. 9, 2010), *vacated by* 679 F.3d 657 (8th Cir. 2012). Accordingly, it ordered the EEOC to reimburse CRST approximately $4.5 million, which represented only a portion of the attorney's fees and other costs it incurred to defend the agency's lawsuit. *Id.* at *20.

On appeal, the Eighth Circuit affirmed dismissal of the 67 individual claims, agreeing with the district court that "the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women ...." Pet. App. 115a-116a. It also affirmed summary judgment on the merits as to all but two claims. Pet. App. 114a. Because those two claims were remanded

to the district court, the Eighth Circuit vacated the award of attorney's fees and costs to CRST without prejudice to reinstatement. Pet. App. 156a.

On remand, the EEOC voluntarily withdrew one of the individual claims and settled the other, but in doing so, agreed that CRST could renew its request for attorney's fees. Pet. App. 9a. The trial court once again found that the EEOC's litigation conduct was frivolous and unreasonable, and awarded CRST a total of $4,189,296.10 in attorney's fees, $413,387.58 in out-of-pocket expenses, and $91,758.46 in taxable costs. Pet. App. 84a-85a. Dissatisfied with the trial court's ruling, the EEOC appealed for a second time to the Eighth Circuit, contending that it – and not CRST – was the "prevailing party" for attorney's fees purposes. Pet. App. 17a-18a.

On appeal, the Eighth Circuit rejected the EEOC's contention that its class-based lawsuit – which was brought on behalf of at least two individuals – represented only one "claim." Pet. App. 17a-18a. At the same time, it found that the agency never formally asserted that CRST was engaged in a pattern-or-practice of sex discrimination. Pet. App. 18a. Accordingly, to the extent that the district court merely assumed that the EEOC's lawsuit encompassed such a claim, and awarded attorney's fees on that basis, the Eighth Circuit held that the judgment was erroneous. *Id.*

Second, the Eighth Circuit found that the district court erred in construing the dismissal of the EEOC's individual claims for failure to satisfy its statutory pre-suit obligations as a decision on the merits. Pet. App. 23a-24a. It reasoned that because compliance with pre-suit administrative requirements is not an element of a substantive discrimination claim, a ruling

that the EEOC failed to do so cannot constitute a decision on the merits for attorney's fees purposes. *Id.* Accordingly, it found that CRST was not a "prevailing party" and thus was not entitled to an attorney's fees award. *Id.* After its petition for rehearing *en banc* was denied, CRST filed a petition for writ of certiorari, which this Court granted on December 4, 2015.

SUMMARY OF ARGUMENT

The Eighth Circuit incorrectly held that prevailing defendants are not entitled to an award of attorney's fees and costs pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, in the absence of a judicial determination on the merits, and that dismissal of an action brought by the U.S. Equal Employment Opportunity Commission (EEOC) for failure to comply with its statutory pre-suit obligation to investigate and conciliate does not constitute a "merits" decision. Because it is contrary to Title VII's text, policy aims, and purposes and is inconsistent with this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the decision should be reversed.

The EEOC was created by and is charged with enforcing Title VII, which prohibits discrimination in the terms, conditions or privileges of employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1). The statute establishes "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote

omitted)). Although it is authorized to initiate civil actions against employers it believes to have violated the Act, the EEOC may not do so unless and until it has discharged its statutory pre-suit administrative requirements, including completing an investigation of the charge. 42 U.S.C. § 2000e-5(b).

Title VII expressly authorizes courts to award a prevailing party, "other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs ...." 42 U.S.C. § 2000e-5(k). It places no conditions on the court's discretion to award such fees, except to specify attorney's fees are not available if the prevailing party is either the EEOC or another federal government agency. *Id.*

In *Christiansburg*, this Court held that unlike prevailing plaintiffs, prevailing *defendants* may be awarded reasonable attorney's fees and costs under Section 706(k) only if the claim is found to have been "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U.S. at 422. The Court found that the heightened standard was necessary so as not to discourage plaintiffs from pursuing meritorious claims for fear of losing and, as a result, having to reimburse the defendant employer its fees and costs – which likely could far exceed the plaintiff's own costs, as well as the value of his or her claim. At the same time, the Court recognized that by allowing courts to award fees to prevailing defendants, Congress "also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420.

Other than clarifying the standard under which a prevailing defendant's request for attorney's fees should be evaluated, *Christiansburg* does not impose any limitations on the availability of such awards, and

certainly does not restrict attorney's fees to cases in which the merits were fully adjudicated. To the contrary, *Christiansburg* itself involved a claim for attorney's fees based on dismissal of an EEOC suit on procedural grounds. Thus, the decision below, which purports to absolve the EEOC of any liability for a prevailing defendant's attorney's fees in cases dismissed based on anything other than a final adjudication of the discrimination claim on the merits, is irreconcilable with Title VII's plain text and this Court's interpretation of it in *Christiansburg*.

There are many sound policy reasons for allowing prevailing defendants to recover reasonable attorney's fees incurred defending an ultimately unsuccessful EEOC lawsuit based on claims that were never subjected to administrative review, including to disabuse any notion that such "legal lapses and violations ... have no consequence." *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645, 1652-53 (2015). Indeed, in its zeal to litigate large, high profile class-based suits, the EEOC's enforcement priorities seemingly have focused less on informal resolution of discrimination charges, as contemplated by Title VII, and more on developing and maintaining a broad, class-based litigation docket. Such conduct should not be tolerated by the courts, and surely was in this case sufficiently unreasonable, frivolous and baseless to justify awarding reasonable attorney's fees and costs to the prevailing defendant.

ARGUMENT

I. THE DECISION BELOW, WHICH PURPORTS TO ABSOLVE THE EEOC OF ANY LIABILITY FOR ATTORNEY'S FEES IN CASES RESOLVED AGAINST IT ON PROCEDURAL GROUNDS RATHER THAN ON THE MERITS, HAS NO BASIS IN TITLE VII AND CONFLICTS WITH THIS COURT'S DECISION IN *CHRISTIANSBURG GARMENT CO. v. EEOC*

The Eighth Circuit below incorrectly held that attorney's fees may not be awarded to a prevailing defendant under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, in the absence of a judicial determination on the merits. Neither the statute's plain text nor this Court's holding in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), restricts a court's discretion to award reasonable attorney's fees and costs in cases involving unreasonable litigation conduct leading to dismissal on procedural grounds – here, the U.S. Equal Employment Opportunity Commission's (EEOC) failure to investigate, issue a determination, and attempt conciliation prior to bringing suit. Accordingly, the decision below is erroneous and should be reversed.

A. Title VII Does Not Limit The Award Of Attorney's Fees And Costs To Parties Who Have Prevailed On The Merits

Enforced by the EEOC, Title VII prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Section 706(k) of the statute contains a fee-shifting provision that permits a court to award a prevailing party reasonable attorney's fees:

> In *any* action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (emphasis added).

Other than conferring upon courts the discretion to award attorney's fees to a prevailing party, Section 706(k) does not otherwise limit the specific circumstances under which such awards are warranted. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). Thus, nothing in the statute differentiates between cases resolved on substantive grounds and those resolved on procedural grounds regarding the availability of attorney's fees.

B. This Court's Ruling in *Christiansburg Garment Co. v. EEOC*, Which Established The Standard For Awarding Attorney's Fees To A Prevailing Defendant, Involved Underlying Claims That Were Dismissed On Procedural Grounds

This Court has held with respect to a fee-shifting provision that is materially indistinguishable from Section 706(k) that prevailing plaintiffs "'should ordinarily recover an attorney's fee unless special

circumstances would render such an award unjust.'" *Christiansburg*, 434 U.S. at 416-17 (quoting *Newman v. Piggie Park Enters, Inc.*, 390 U.S. 400, 402 (1968)). In *Christiansburg Garment Co. v. EEOC*, this Court enunciated a different standard for determining whether a prevailing *defendant* in a Title VII action is entitled to recoup its reasonable attorney's fees and costs. 434 U.S. 412 (1978). It held that a prevailing defendant is entitled to an award of attorney's fees and costs when a court finds that the claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. The Court reasoned that a heightened burden is necessary so as not to "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.* At the same time, it observed that "while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420. The Court also noted that Title VII's attorney's fee provision "explicitly provides that 'the Commission and the United States shall be liable for costs the same as a private person.'" *Id.* at 423 n.20 (citation omitted). Thus, it found "no grounds for applying a different general standard whenever the Commission is the losing plaintiff." *Id.*

Christiansburg involved a civil action filed by the EEOC two years after the plaintiff received, but failed to act on, a right-to-sue notice advising her of the agency's disposition of her discrimination charge. When the plaintiff initially filed her administrative charge with the EEOC, Congress had not yet amended Title VII authorizing the agency to sue in its own name on behalf of discrimination victims. Once Congress did so, *see* Equal Employment Opportunity Act of 1972,

Pub. L. No. 92-261, 86 Stat. 103 (1972), the EEOC commenced a civil action based on the earlier-filed charge. The employer moved for summary judgment, arguing among other things that the charge had not been "pending" as of the date the EEOC obtained litigation authority and thus could not form the basis of an EEOC lawsuit.

After its motion was granted, the employer moved for an award of attorney's fees pursuant to Section 706(k). The district court found that because the EEOC's "action in bringing the suit cannot be characterized as unreasonable or meritless," 434 U.S. at 415, the defendant was not entitled to an award of attorney's fees. On appeal, the Fourth Circuit affirmed.

The question before this Court in *Christiansburg* was not whether Section 706(k) applies only in cases adjudicated on the merits. Rather, it was "what standard should inform a district court's discretion in deciding whether to award attorney's fees to a successful *defendant* in a Title VII action." *Id.* at 417. Rejecting the EEOC's contention that attorney's fees are available to prevailing defendants only where the unsuccessful plaintiff is found to have brought the claim in bad faith, the Court instead adopted a less stringent standard that respects Congress's desire "to clear the way for suits to be brought under the Act," *id.* at 420, while at the same time "protect[s] defendants from burdensome litigation having no legal or factual basis." *Id.* In affirming the trial court's decision, the Court credited its conclusion that the EEOC's action was not frivolous because it was based on a novel issue of law regarding the proper construction of the 1972 Amendments.

The fact that the underlying complaint in *Christiansburg* was dismissed on procedural grounds

has been lost on the EEOC, which in its brief to this Court misconstrues its holding as follows:

> Petitioner contends that *Christiansburg* supports its position here because the basis for attorney's fees in that case was not a merits determination, but a finding that no charge was pending with the EEOC when the EEOC obtained the right to sue in its own name in 1972. But this Court did not uphold an award of attorney's fees on that basis; rather, the courts below *declined* to award attorneys' fees and this Court affirmed that determination.

EEOC Br. Opp. Cert. at 14. Of course, as noted, the prevailing defendant's motion for attorney's fees in *Christiansburg* was denied *not* because of the procedural posture of the case, but because the EEOC's prosecution – which raised novel questions regarding the scope of its brand-new litigation authority – was not, in the Court's view, "unreasonable or meritless." 434 U.S. at 415 (citation and internal quotation omitted).

In this case, the Eighth Circuit concluded that, for purposes of determining whether a prevailing defendant should be awarded attorney's fees, "proof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits." Pet. App. 18a (citation omitted). And according to the EEOC, "The determination that the plaintiff's legal position was 'frivolous, unreasonable, or groundless' depends on an assessment of the merits of the plaintiff's claims for relief." EEOC Br. Opp. Cert. at 10 (citation omitted).

Such an interpretation does not square with Title VII's text or with this Court's analysis in

Christiansburg. Even if that view were facially plausible, it still should not operate to preclude recovery of attorney's fees in a case like this one, in which the merits of the class members' claims were *never* assessed by the EEOC at the administrative stage. CRST was required to devote inordinate time and resources to defend class-based claims that the EEOC concedes were not fully developed even well after the agency's suit was filed.

Under the EEOC's reading of Title VII and *Christiansburg*, an employer like CRST that is hauled into court by the EEOC on an unevaluated suspicion – essentially, a hunch – of discrimination would have to forgo its right to challenge the agency's compliance with its pre-suit statutory obligations, *see Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), instead expending substantial resources in discovery to support a dispositive motion seeking dismissal of the action on the merits. Assuming the EEOC were unsuccessful in its efforts to "fish" for claims during discovery, the employer's motion likely would be granted, and only then would it be permitted to move for attorney's fees. The employer will have spent tens or hundreds of thousands, if not millions, of dollars defending claims that may never have been brought had they been subjected to a proper administrative investigation. Such a result is contrary to the policy considerations made by Congress and elucidated in *Christiansburg* in favor of allowing the recovery of attorney's fees by prevailing defendants.

II. THE EEOC'S FAILURE TO INVESTIGATE AND MAKE FACTUAL DETERMINATIONS AS TO INDIVIDUAL CLAIMS AT THE ADMINISTRATIVE STAGE RENDERS ITS SUBSEQUENT, CLASS-BASED SUIT UNREASONABLE ON ITS FACE

In this case, as in far too many others, "when the complaint was filed, the EEOC had failed to identify the class of victims who could be entitled to monetary relief ...." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152 (4th Cir. 2014). It could not identify the victim class because it failed to investigate whether or not any woman other than Starke had, in fact, been subjected to conduct giving rise to a colorable sex discrimination claim. That the EEOC would commence a civil action in federal court on behalf of the purported victim class despite *never* having independently assessed whether and to what extent any individual other than Starke stated a plausible claim of sexual harassment smacks of unreasonableness, and the Eighth Circuit erred in disallowing an award of attorney's fees to the prevailing defendant on that basis. Accordingly, the decision below should be reversed.

A. Under Title VII, The EEOC's Authority To Sue Is Conditioned Upon Fulfillment Of All Pre-Suit Administrative Requirements, Including Reasonable Investigation Of The Underlying Charge

Unlike private litigants, the EEOC has a special obligation to carefully evaluate the facts of every case and seek informal resolution of meritorious claims *before* undertaking costly and resource-intensive litigation. Its failure to do so, coupled with an adverse

outcome in court, should be more than sufficient to give rise to an attorney's fees sanction under *Christiansburg*.

This Court has observed that Title VII sets forth "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). Once a charge has been filed, Title VII provides that "the Commission shall serve a notice of the charge ... within ten days, and shall make an investigation thereof." 42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC authority to prevent and correct discrimination through this administrative framework of charge investigations and, where appropriate, informal conciliation, but not the authority to litigate. Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

"Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act." *Occidental Life*, 432 U.S. at 368 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)). The EEOC's procedural regulations also reflect this Congressional mandate, providing that "[t]he investigation of a charge *shall* be made by the Commission ...." 29 C.F.R. § 1601.15(a) (emphasis

added). Whenever the agency "completes its investigation . . . [and finds] no[] reasonable cause to believe that an unlawful employment practice has occurred or is occurring *as to all issues addressed in the determination*, the Commission shall issue a letter of determination" to that effect. 29 C.F.R. § 1601.19(a) (emphasis added). Where the EEOC does find reason to believe discrimination occurred, the EEOC may issue a determination "based on, and limited to, evidence obtained by the Commission" during the investigation. 29 C.F.R. § 1601.21(a); only when the EEOC is "unable to obtain voluntary compliance," 29 C.F.R. § 1601.25, through "informal methods of conference, conciliation and persuasion" may it initiate a public enforcement action. 29 C.F.R. § 1601.24; *see also* 42 U.S.C. § 2000e-5(b).

Accordingly, the EEOC's pre-suit administrative process involves several distinct stages: (1) providing notice of the charge; (2) undertaking an investigation; (3) conducting a post-investigation determination of the merits of the charge; and (4) if reasonable cause is found, attempting to eliminate unlawful practices through conciliation. *Id.* Nevertheless, "Each step in the process – investigation, determination, conciliation, and if necessary, suit – is intimately related to the others." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1306 (W.D. Pa. 1977); *see also EEOC v. Bloomberg LP*, 967 F. Supp. 2d 802, 810 (S.D.N.Y. 2013); *EEOC v. Jillian's of Indianapolis, Inc.*, 279 F. Supp. 2d 974, 979 (S.D. Ind. 2003). In addition, the "completion of the full administrative process is a prerequisite to the EEOC's power to bring suit in its own name." *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1186 (4th Cir. 1981); *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975).

1. The scope of an EEOC lawsuit cannot exceed that of the underlying charge investigation

The EEOC generally is permitted to pursue in litigation any suspected violation that grows out of facts uncovered during a "reasonable investigation" of the underlying discrimination charge. *See EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992). This "reasonable investigation" rule restricts the EEOC from altogether circumventing Title VII's "integrated, multistep enforcement procedure," *Shell Oil*, 466 U.S. at 62 (citation omitted), by including in a lawsuit claims that were never subject to an investigation, reasonable cause determination, and conciliation. *See Delight Wholesale Co.*, 973 F.2d at 668-69; *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1264 (D. Colo. 2007); *Jillian's*, 279 F. Supp. 2d at 979-81 (S.D. Ind. 2003); *see also EEOC v. Bass Pro Outdoor World, LLC*, 1 F. Supp. 3d 647, 671 (S.D. Tex. 2014) (noting that the EEOC "can bring an enforcement action only with regard to unlawful conduct that was discovered and disclosed in the pre-litigation process") (citations omitted). To permit otherwise would offend this Court's, and Congress's, insistence that Title VII's "overall enforcement structure [should be] a sequential series of steps beginning with the filing of a charge with the EEOC." *Occidental Life*, 432 U.S. at 372.

"Thus, while '[t]he EEOC may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged,'" it 'must discover such individuals and wrongdoing *during the course of its investigation.*'" Pet. App. 109a (citations omitted). Indeed, even as the Eighth Circuit

below acknowledged, "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation." Pet. App. 110a (citations omitted).

Lower courts therefore have made abundantly clear that an EEOC lawsuit must be "the product of the investigation that reasonably grew out of the underlying charges," as distinguished from facts gathered for the first time in litigation. *Jillian's*, 279 F. Supp.2d at 980. In short, the EEOC may not use discovery "as a fishing expedition" to uncover violations. *EEOC v. Harvey L. Walner Assocs.*, 91 F.3d 963, 971-72 (7th Cir. 1996).

2. *Mach Mining* is inapposite

In *Mach Mining v. EEOC*, this Court held that courts may review the sufficiency of the EEOC's compliance with its mandatory, pre-suit conciliation obligations. 135 S.Ct. 1645 (2015). Acknowledging that Title VII gives the EEOC broad discretion regarding what matters to conciliate and when to conclude such efforts, the Court also found that Congress did not leave all pre-suit matters to the EEOC's sole discretion. For instance, if the EEOC made no effort whatsoever to conciliate prior to filing suit, "Title VII would offer a perfectly serviceable standard for judicial review: Without any 'endeavor' at all, the EEOC would have failed to satisfy a necessary condition of litigation." *Id.* at 1652.

The Court explained that Title VII's conciliation provision – specifically, its "conference, conciliation and persuasion" language – provides a concrete

roadmap as to what constitutes an adequate conciliation effort on the EEOC's part. Those terms "necessarily involve communication between parties, including the exchange of information and views," *id.*, on the alleged discriminatory employment practice. Accordingly, in order to meet its conciliation obligation, the EEOC "must tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." *Id.*

While helpfully outlining a standard under which EEOC conciliation efforts are to be assessed, *Mach Mining* does not reach the question presented here, that is, whether a prevailing defendant's entitlement to attorney's fees is dependent upon a judicial determination on the merits, nor does it address the consequences of the EEOC's failure to *investigate* individual claims prior to filing a class-based lawsuit. Thus, the EEOC's claim that *Mach Mining* "confirms the correctness of the court of appeals' ruling" in this case, EEOC Br. Opp. Cert. at 9, is incorrect.

B. The EEOC Filed Suit Without Any Evidence In Hand To Support Its Class-Based Discrimination Claim

It follows that dismissal of an EEOC lawsuit based on claims that were not subject to proper investigation justifies an award of attorney's fees under *Christiansburg*. In particular, when the EEOC files suit without first having determined whether the evidence it needs to win actually exists, the lawsuit cannot be considered anything but lacking foundation,

and the agency's actions deemed both frivolous[2] and unreasonable. As the Fourth Circuit has observed:

> No doubt Congress was aware that assessing attorneys' fees against the EEOC when it brings a groundless suit might provide a disincentive for the agency to litigate meritorious cases. But it was not unreasonable for Congress to expect the Commission, with its store of expertise and experience, to recognize a baseless suit before being told the same by a federal court. For this reason, "[w]hen a court imposes fees on a plaintiff who has pressed a 'frivolous' claim, it chills nothing that is worth encouraging."

Propak Logistics, Inc., 746 F.3d at 155 (citation omitted).

In *EEOC v. Propak Logistics, Inc.*, the Fourth Circuit affirmed an attorney's fee award to a prevailing defendant in a class action brought by the EEOC, finding that "the EEOC acted unreasonably in filing the employment discrimination complaint, because events that occurred during the EEOC's administrative investigation precluded the EEOC from obtaining either injunctive or monetary judicial relief." 746 F.3d 145, 147 (4th Cir. 2014). It credited the trial court's conclusion that the EEOC's lawsuit "effectively was moot at its inception," *id.* at 152, in part, because the agency had failed through its administrative investigation to identify a specific class of victims entitled to monetary relief. *Id.* The Fourth Circuit found that the trial court's decision to award attorney's fees to the prevailing defendant "reflected proper consideration of

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[2] The term "frivolous" is defined as "[l]acking a legal basis or legal merit; not reasonably purposeful." Black's Law Dictionary (10th ed. 2014).

the *Christiansburg* standard by assessing whether the EEOC acted unreasonably in initiating the litigation." *Id.* (footnote omitted).

Here, the EEOC accused CRST of violating Title VII by maintaining a sexually hostile work environment as to a substantial number of women. Yet, because it failed to investigate all but one of the women's claims, the EEOC could not have gone into court with any evidence with which to establish a prima facie case of sexual harassment as to the alleged class. In *Harris v. Forklift Systems, Inc.*, this Court held that "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." 510 U.S. 17, 21 (1993) (citations omitted).

In *Faragher v. City of Boca Raton*, the Court further explained:

> [I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'

524 U.S. 775, 787-88 (1998) (citations and quotations omitted); *see also, e.g., Hockman v. Westward*

Communs., LLC, 407 F.3d 317, 326 (5th Cir. 2004) (the conduct in question "must be 'so severe [or] pervasive that it destroys a protected classmember's opportunity to succeed in the work place'") (citation omitted). In this case, the EEOC admittedly conducted no investigation to determine whether any of the class members, other than Starke, could assert even a colorable claim of sexual harassment. Despite having no factual or legal foundation on which to build its case, the EEOC nevertheless proceeded to court – only to have all but one claim dismissed with prejudice.

> No reasonable jury could have found the evidence in this case sufficient to sustain a Title VII claim, and the EEOC, which is charged with enforcing the nation's employment laws, should have recognized that fact. Rather than do so, the EEOC continued to press a baseless claim long after it should have been dismissed, imposing upon [CRST] years of litigation at enormous expense, both in terms of time and money. Disallowing attorneys' fees and expenses under the circumstances of this case would constitute a manifest injustice.

EEOC v. W. Customer Mgmt. Grp., LLC, 2014 WL 4409920, at *5 (N.D. Fla. July 28, 2014), *report and recommendation adopted in part*, 2014 WL 4435980 (N.D. Fla. Sept. 8, 2014), *appeal dismissed*, No. 15-13649 (11th Cir. Oct. 22, 2015); *see also EEOC v. Global Horizons, Inc.*, 100 F. Supp. 3d 1077, 1079 (E.D. Wash. 2015) ("To balance Title VII's purpose with the need to ensure that businesses are not forced to litigate baseless discrimination claims, Congress imposed a statutory duty on the EEOC to provide notice to an employer of the charged discriminatory practice, investigate the charge, and conciliate with

the business before filing a lawsuit. Title VII and Supreme Court case law encourages the EEOC to utilize these processes to ensure that a lawsuit is filed reasonably, with foundation, and is not frivolous, imposing a potential award of attorney's fees against the EEOC if it files a lawsuit that did not meet these standards").

The EEOC possesses (perhaps above all other would-be plaintiffs) sufficient "expertise and experience[] to recognize a baseless suit before being told the same by a federal court." *Propak*, 746 F.3d at 155. For that reason, the agency should not be permitted to escape unpunished for pressing claims that, had it complied with its administrative requirements, it would have discovered are meritless. As the district court noted, "When it is the EEOC, as opposed to an individual, bringing suit, Title VII imposes an additional claim to relief. That is, in addition to proving the usual elements of a sexual harassment claim, the EEOC must also establish that it pursued an administrative resolution." Pet. App. 58a-59a.

Therefore, in deciding whether or not fees should be awarded to a prevailing defendant in such a case, courts can and should evaluate the extent to which the agency's non-compliance at the administrative stage rendered a subsequent lawsuit baseless or unreasonable. "Although the Court is not reviewing the individual sufficiency of the EEOC's reasonable-cause determination or conciliation process, the Court must consider the information discovered (or failed to be discovered) during these processes in order to assess whether the EEOC filed the lawsuit with foundation or whether the filing was reasonable or frivolous." *Global Horizons*, 100 F. Supp. 3d at 1080.

C. The EEOC's Failure To Conciliate Any Of The Class Members' Claims Prior To Suit Merely Compounded Its Unreasonable Conduct

The EEOC's failure to investigate all but one of the purported claims on which it brought suit in turn prevented it from making sound factual determinations and engaging in meaningful conciliation as to meritorious claims, which only compounded the unreasonableness of its actions in this matter. *See EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003). The importance of proper charge investigation to meaningful fulfillment of the EEOC's statutory conciliation duties is profound. *See EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1305-06 (W.D. Pa. 1977) (emphasis added).

Accordingly, when the EEOC wholly abandons its responsibility to investigate, as it did here, the agency undermines its own ability to perform the next steps in the process. The investigation serves as the foundation for all that comes after, and without it, the agency deprives the employer of any meaningful opportunity to conciliate a claim in lieu of litigation.

As the Ninth Circuit observed in *Pierce Packing*:

> The Commission's functions of investigation, decision of reasonable cause and conciliation are crucial to the philosophy of Title VII. It is difficult to believe that Congress directed the Commission to make a determination of reasonable cause on the merits of a charge and nevertheless contemplated that the Commission could institute such litigation before it makes such a determination. Similarly, it is difficult to conclude that Congress directed the Commission to conciliate and then

> authorize it to initiate adversary proceedings before the possibility of voluntary compliance has been exhausted.

EEOC v. Pierce Packing Co., 669 F.2d 605, 608 (9th Cir. 1982) (citation omitted).

In this case, the "procedural and regulatory defects committed by the EEOC were clearly cognizable at an early stage in this litigation's history. The EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness." *Id.* at 609 (citation omitted). Among other things, the EEOC admitted that it conducted *no investigation* into any of the 67 claims that survived discovery, and that roughly one-third of those claims did not even arise until *after* the agency's civil complaint was filed. Pet. App. 204a-205a. Of the 40 women whose claims did emerge prior to suit, the EEOC actually knew about only two of them going into court, and resorted to discovery to find the others. Pet. App. 205a.

When the EEOC presses in litigation claims that (1) were not developed in an investigation and thus were not ripe for meaningful conciliation discussions and (2) it should have known were destined to fail for lack of evidence, the prevailing employer should not, in the end, be left holding the bag.

III. PERMITTING THE EEOC TO AVOID ATTORNEY'S FEES SANCTIONS FOR PURSUING PREDICTABLY UNSUCCESSFUL LITIGATION PREMISED ON UNINVESTIGATED DISCRIMINATION CLAIMS DEFEATS THE PURPOSES AND OBJECTIVES OF TITLE VII AND DISADVANTAGES EMPLOYERS AND EMPLOYEES ALIKE

> [Regardless of the potential] public policy reasons for exercising caution when considering an award of attorneys' fees against a plaintiff, as well as the implications of such an award against the EEOC, [courts must remain mindful] of the impact baseless lawsuits have on employers and businesses, particularly when they are backed by the full force, and seemingly unlimited purse, of the government.

EEOC v. W. Customer Mgmt. Grp., LLC, 2014 WL 4409920, at *5. Indeed:

> Many employers are inclined to conciliate and settle as it is often more efficient than ultimately winning a case on the merits. The current statutory scheme places an employer in the predicament of attempting to amiably negotiate with an agency whose principles are sometimes best served by making an example of an employer. Logically, expending resources defending invalid lawsuits may have the effect of hiring reductions, downsizing and even possibly forcing small companies out of operation. Furthermore, the negative stigma of discrimination claims can foreseeably injure a company's reputation, recruiting and ability to conduct normal day-to-day business.

Anthony P. Zana, *A Pragmatic Appreach to EEOC Misconduct: Drawing A Line on Commission Bad Faith in Title VII Litigation*, 73 Miss. L.J. 289, 319-20 (2003) (footnotes omitted).

The *Christiansburg* standard itself "reflects a determination to head off unjustified litigation." *Propak Logistics, Inc.*, 746 F.3d at 155. Litigation that is procedurally infirm can be, and often is, extremely damaging to the defendant, regardless of the merit (or lack thereof) of the underlying claim. Moreover, "A party forced to defend against a groundless lawsuit is prejudiced every bit as much if the litigation is brought by a federal agency as if it were commenced by a private party." *Id.*

> The EEOC in particular brings suit against a wide range of employers for whom the defense of lawsuits may be prohibitively expensive. *Christiansburg* was sensitive to this problem, noting that 'many defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights.'

Id.

The EEOC's current enforcement strategy places particular emphasis on class-based systemic and pattern-or-practice discrimination litigation.[3] In its

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[3] According to the EEOC's Strategic Enforcement Plan (SEP) for Fiscal Years 2013–2016, of particular interest to the EEOC are "issues that will have broad impact because of the number of individuals, employers or employment practices affected." U.S. EEOC, Strategic Enforcement Plan FY 2013–2016, at III.A.1., *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Jan. 25, 2016).

Strategic Enforcement Plan (SEP) for Fiscal Years 2013-2016, for instance, the EEOC has committed to progressively increasing the percentage of systemic cases on its active litigation docket each fiscal year.[4] To that aim, the agency has established a specific, numerical quota that it expects its enforcement staff to meet, largely ignoring objections from the business community that such an approach would encourage hasty, insufficient systemic charge investigations and detract from meaningful, pre-suit settlement efforts.[5] Although the EEOC's current SEP requires field offices to progressively increase the percentage of systemic cases on their active litigation dockets, it gives no indication whatsoever that pre-suit charge resolution or meaningful investigation are agency priorities or even significant concerns. Such policies incentivize staff to bypass investigation and pre-suit conciliation in favor of high-profile, class-based lawsuits that are likely to end, as this one did, in dismissal. Even if the case eventually produces some measure of victim-specific relief, it typically is at the expense of the individual charging party whose original claims often remain pending for years.

To the extent that the EEOC has formalized enforcement tactics that are at odds with the purposes

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[4] U.S. EEOC, SEP FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Jan. 25, 2016).

[5] The agency has met or exceeded the SEP active systemic litigation targets in the last two fiscal years. *See* U.S. EEOC, Fiscal Year 2014 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/2014par.pdf (last visited Jan. 25, 2016) and U.S. EEOC, Fiscal Year 2015 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/upload/2015par.pdf (last visited Jan. 25, 2016).

and objectives of Title VII, it is now more important than ever that the courts retain the discretion to sanction the agency for such litigation abuses. A particularly effective deterrent is the award of attorney's fees to a prevailing defendant where it is determined that the EEOC's failure to investigate results in the filing, and eventual dismissal, of a groundless lawsuit.

Moreover, as noted above, although the EEOC generally is permitted to pursue in litigation any statutory violation growing out of facts uncovered during a "reasonable investigation" of an underlying charge, the agency must actually investigate prior to suit in order to invoke that rule. *See Delight Wholesale Co.*, 973 F.2d at 668-69. Notwithstanding Title VII's mandate that the EEOC must investigate and conciliate prior to resorting to litigation, the agency in recent years has embarked on a disturbing pattern of "naming everyone and asking questions later." Pet. App. 190a (citation and internal quotation omitted). *See also Propak Logistics, Inc.*, 746 F.3d at 152-54 (dismissing class lawsuit because EEOC had not identified a specific class of victims during its investigation); *EEOC v. Freeman*, ___ F. Supp. 3d ___, 2015 WL 5178420, at *1 (D. Md. Sept. 3, 2015) (finding that the EEOC acted unreasonably in proceeding with litigation even after defendant "revealed the inexplicably shoddy work" of its expert witness); *Bloomberg*, 967 F. Supp. 2d at 816 (S.D.N.Y. 2013) (recognizing "where, as here, the EEOC completely abdicates its role in the administrative process, the appropriate remedy is to bar the EEOC from seeking relief . . . and dismiss the EEOC's Complaint"); *Jillian's*, 279 F. Supp. 2d at 980 (granting summary judgment in favor of employer on nationwide class allegations because "[t]he EEOC's investigation of the

four charges was conducted entirely with respect to Jillian's Indianapolis. Its Amended Complaint, alleging a nationwide class, has insufficient basis in its actual investigation").

The EEOC's rush to litigate claims that it never examined at the charge investigation stage, or never attempted to resolve through conciliation, confirms *amici*'s growing concern that the agency effectively has abandoned its commitment to pursue meaningful administrative charge resolution, choosing instead the more expedient, high-profile litigation route. Indeed, *amici* are extremely troubled by the EEOC's recent efforts to expand its own authority under Title VII, while at the same time working to sharply curtail the role of the courts in policing its enforcement activities. *See, e.g.*, *Mach Mining*, 135 S. Ct. at 1650 (where the EEOC argued unsuccessfully that its pre-suit conciliation efforts are not subject to any measure of judicial review); *Propak Logistics, Inc.*, 746 F.3d at 149-150 (where the EEOC argued unsuccessfully that the doctrine of laches can never be applied when the government is the plaintiff). Allowing the decision below to stand would invite the EEOC to ignore its statutorily-mandated pre-suit requirements without any meaningful repercussions. As this Court observed in *Mach Mining*, "[w]e need only know – and know that Congress knows – that *legal lapses and violations occur, and especially so when they have no consequence*." 135 S. Ct. at 1652-53 (emphasis added).

Title VII actions often are complex, time-consuming, and very costly to defend. This is especially true of the substantial number of Title VII cases brought against small to mid-sized employers whose litigation resources often pale in comparison to those of the federal government. *See Christiansburg*, 434 U.S. at 423 n.20

(noting that "many defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights"). The rule created by the court below, if allowed to stand, essentially would create a "get out of jail free card" for the EEOC — leaving a prevailing defendant on the hook for substantial attorney's fees and costs for claims that never should have been brought in the first place. *See, e.g.*, Pet. App. 84a (awarding CRST $4,189,296.10 in attorneys' fees, $91,758.46 in costs, and $413,387.58 in out-of-pocket expenses); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 587, 591-92 (6th Cir. 2013) (affirming lower court's order that EEOC reimburse employer nearly $800,000 in attorney's fees and costs in having to defend against Title VII lawsuit that EEOC continued to pursue even after it should have known it had no merit); *EEOC. v. TriCore Reference Labs.*, 493 F. App'x 955, 960-61 (10th Cir. Aug. 16, 2012) (upholding award of over $750,000 in attorney's fees and costs because the EEOC knew or had reason to know that its lawsuit was "frivolous, unreasonable, and without foundation").

CONCLUSION

For all of the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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